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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

Allan Rhoades and
David Emmerling — *Petitioners,*

vs.

Arkansas — *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourth Amendment of the Constitution of the United States bar the warrantless routine felony arrest and search of defendants in their home, by ten police officers, given ample probable cause and no exigent circumstances, because one of those officers had been invited in on prior occasions for negotiations of a marijuana sale?

2. If consent to an officer's entry to the home may be implied because of the officer's earlier entries under the misrepresentation that he was coming to purchase narcotics, does *Lewis v. United States*, 385 U.S. 206 (1966) permit the officer, to enter and, once inside, to arrest the defendants and forceably seize the marijuana, or, on the other hand, do *Coolidge v. New Hampshire*, 403 U.S. 443 (1961), *Trupiano v. United States*, 334 U.S. 699 (1948) and *Payton v. New York*, _____ U.S. _____, 100 S.Ct. 1371 63 L.Ed. 2d 639 (1980) prohibit it?

3. If an undercover officer has ample probable cause to obtain a search warrant and ample opportunity to do so, must he obtain a warrant before a search or may he enter the home of the defendants by consent deceitfully obtained and conduct a search?

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

No. ____

Allan Rhoades and
David Emmerling *Petitioners,*

vs.

Arkansas *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Arkansas Supreme Court in this case.

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OPINIONS BELOW

The opinion of the Arkansas Court of Appeals appears as *Rhoades and Emmerling v. State*, 270 Ark. 962, ____ S.W.2d ____ (1980) and is reproduced in the Appendix, *infra*. The orders of the Court of Appeals denying rehearing and of the Arkansas Supreme Court denying review were without opinion. The order of the Arkansas Supreme Court denying review is also reproduced in the Appendix, *infra*.

JURISDICTION

The Arkansas Court of Appeals entered its decree on October 29, 1980. A petition for rehearing in the Arkansas Court of Appeals was submitted November 19, 1980, and denied December 3, 1980. A petition for review of this decision by the Arkansas Supreme Court was submitted November 24, 1980, and denied December 8, 1980. Sixty days from December 8, 1980, is February 6, 1981.

This court has jurisdiction under 12 U.S.C. §1257 (3).

CONSITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, AMENDMENT 14

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners were accused by felony information of committing the offense of possession of a controlled substance with intent to deliver, to wit, 120 pounds of marijuana, a felony. After a hearing on the petitioner's motion to suppress, they were tried, convicted, and fined $10,000 apiece and sentenced to two and one-half years in the Arkansas Department of Corrections. Petitioners' convictions were affirmed on appeal to the Arkansas Court of Appeals and the Arkansas Supreme Court denied review.

Facts, including references to the record when federal questions were raised.

Probable Cause Hearing

The facts which developed at the hearing to determine probable cause were that the Arkansas State Police conveyed information to Mike Sylvester of the Little Rock Police Department that an individual in Michigan, Kevin Ishmael, had set up the marijuana transaction with the petitioners in Arkansas. Officer Sylvester met with Mr. Ishmael at the Little Rock Airport October 31, 1978. On leaving the terminal he was met by Rhoades and rode in the Rhoades vehicle to the Rhoades' residence. Officer Sylvester observed about six pounds of marijuana at the home. When Officer Sylvester told petitioner Rhoades that the marijuana was deficient in quality, Rhoades suggested they visit petitioner Emmerling in another county.

Officer Sylvester drove petitioner Rhoades to petitioner Emmerling's home in an undercover police car. At that point officer Sylvester and petitioners loaded approximately sixty pounds of marijuana into the police car

which officer Sylvester drove to Rhoades' residence and helped Rhoades load into his home.

About 9 p.m. Officer Sylvester left the company of the petitioners for the evening during which interval Mr. Emmerling delivered approximately forty more pounds of marijuana to Rhoades' residence. Officer Sylvester called at 10:15 a.m. and talked to Rhoades who stated that the rest of the marijuana was at the residence. Officer Sylvester arrived at the residence at 11:00 a.m. and upon entering the residence saw large quantities of marijuana. The officer assisted the petitioners in weighing and bagging the marijuana at Rhoades' residence.

Officer Sylvester left the residence at 11:30 for a conference with the other officers. Officer Sylvester stated that he returned to the residence and on a pre-arranged signal the remaining officers came to the residence and assisted in the arrest of the petitioners.

At the conclusion of that hearing petitioners moved to suppress all of the evidence on the grounds that there was no search warrant and any consent was obtained by fraud. That motion was overruled. (T. 126)

Between that hearing and trial petitioners filed a motion to suppress on the grounds there was no search warrant, no arrest warrant, nor consent, nor exigent circumstances, citing *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 824 (1961); *Trupiano v. United States*, 334 U.S. 699, 68 S.Ct. 1229 ____ L.Ed. ____ (1948) and *Freeman v. State*, 258 Ark. 617, 527 S.W.2d 909 (1975). (T. 126-129)

Petitioners filed an additional motion to suppress prior to trial on grounds of fraud and deceit, citing *Gouled v. United States*, 255 U.S.2 98, 41 S.Ct. 261, 65 L.Ed. 647 (1971); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 202, 29 L.Ed.2d 564 (1971); *United States v. J.B. Kramer Grocery Co.*, 294 F.Supp. 265 (E.D. Ark. 1969); and *Gibbs v. State*, 255 Ark. 997, 504 S.W.2d 719 (1974). (T. 31-T. 33) In response thereto the state cited *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed. 312 (1966) and *Garrison v. State*, 257 Ark. 139, 515 S.W.2d 221 (1974). The record does not reveal that these motions were specifically ruled on prior to trial although they were effectively ruled on during the trial.

Trial

At trial the evidence which was delivered at the hearing on probable cause appeared in more detail.

Officer Sylvester stated that he came in contact with Allan Rhoades at 1:45 in the afternoon. After arriving at the Rhoades' home he saw three or four pounds of marijuana of poor quality and rejected it. At 3:10 p.m. Mrs. Rhoades drove Sylvester to a Ford dealership where he picked up a leased car which was used by him in his undercover capacity. He returned to the Rhoades residence at approximately 4:20 that afternoon.

Upon returning, Rhoades said that he had contacted petitioner Emmerling and had made arrangements for Rhoades and the officer to drive to Fairfield Bay to pick up approximately fifty pounds of marijuana from Emmerling. Rhoades and officer Sylvester arrived in the police car at Emmerling's residence at 6:45 p.m. At that time Emmerling exhibited two large green garbage bags of marijuana to the

officer and the officer took a quarter pound sample. The petitioners agreed to sell marijuana to him at that time. Emmerling agreed to drive to Texarkana, Texas during the night and meet the officer and Rhoades at Rhoades' residence the next morning with more marijuana.

At approximately 7:00 p.m. officer Sylvester left the two petitioners at Emmerling's residence and met with other police officers on the outskirts of town. He returned to the Emmerling residence approximately twenty-five minutes later.

At this point in the trial the petitioners renewed all objections and moved for a continuing objection to references to marijuana during the trial. The Court stated it would consider the continuing objections made but did not rule on the objection. (T. 145)

After Sylvester returned to the Emmerling residence, Emmerling loaded about thirty more pounds of marijuana into the trunk of the police car. Rhoades and the officer then transported the marijuana back to Rhoades' residence and the officer assisted Rhoades in loading the marijuana into the house. He left Rhoades' residence at 9:00 p.m. and was not in the presence of either of the petitioners until 11:00 the next morning. When he called the petitioners the next morning they told him on the telephone that Emmerling was back from Texas and the petitioners were ready to complete the transaction. The officer returned to the Rhoades' residence and assisted the petitioners in weighing and bagging the marijuana into twenty-three five pound bags.

The officer left at that time and advised the surveillance team what he had viewed inside the residence.

The officers agreed that when Sylvester backed his vehicle to the front door of the residence and opened the trunk that the rest of the surveillance team was to come to the residence and assist him in apprehending the petitioners.

The officer returned to Rhoades' residence at approximately 11:50 and at that time he observed the rest of the marijuana packaged. He left the residence again telling petitioners he had the money in a bank bag in the trunk of his vehicle. He went outside, got in his vehicle and backed it up to the front door of the residence, opening the trunk. He stalled for a short period of time to give the surveillance officers a reasonable amount of time to arrive and then entered the residence and advised the petitioners that he was a narcotics officer. At that time ten other officers entered the residence. Along with the marijuana, they seized an address book.

At this point petitioners renewed their objection to the introduction of the marijuana in evidence on the grounds of a lack of a search warrant, which objection was denied. (T. 153)

Officer Sylveste testified that he was known to petitioners as a purchaser of marijuana. He had participated in smoking in that he had simulated smoking marijuana. He had mentioned the sum of $30,000, but never had a nickle and never had any intention of going through with the transaction. His sole purpose was to amass a quantity of marijuana and arrest the defendants for possession.

He was at the residence several times but never had a search warrant. At no time did he ask to search the residence. He had never alerted the petitioners that he was

working for the state police as an undercover officer. They were under the assumption that he was selling narcotics himself and that his name was Michael.

He stated he moved the duffle bag into the house and that Emmerling had stated it was marijuana. He knew what was in the green plastic bags that were moved into the house. He knew where the bags were and where the house was. He knew he had until 9:00 p.m. until the next morning about 11:50 to get a warrant. The officer testified in chambers that he had obtained search warrants two or three hundred times over the last five years.

Late in the trial petitioners again moved to suppress the evidence on the grounds that the officer had no justification for not getting a search warrant. That motion was overruled. (T. 183)

At the conclusion of the state's case the motions were renewed although the record does not reflect that trial court disposed of the renewed motions. (T. 220-221)

Petitioners submitted an instruction that the burden of proof on entrapment lay with the state, relying on *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 ____ L.Ed.2d ____ (1975). That instruction was refused.

The defendants were each convicted of possession of marijuana with intent to deliver, sentenced to two and one-half years in the Arkansas Department of Corrections and fined $10,000 apiece.

APPEAL

On appeal to the Arkansas Court of Appeals the petitioners argued that the evidence seized should not have been admitted because there was no search or arrest warrant in the fact of ample probable cause and time to obtain a warrant. They cited the cases cited to the trial court and in addition, cited *Arkansas v. Sanders*, ____ U.S. ____ 99 S.Ct. 2586 ____ L.Ed.2d ____ (1979) and *Payton v. New York*, ____ U.S. ____, ____ S.Ct. ____ 63 L.Ed.2d 639 (1980). The state, on appeal, relied principally on *Lewis v. United States, supra.*

Petitioners also argued that the state should have had the burden of proof on entrapment, citing *Mullaney v. Wilbur, supra.*

THE RULING BELOW

The Arkansas Court acknowledged that it was being asked to extend the rationale in *Lewis, supra*, where an arrest occurred as a result of analysis of contraband which was purchased and carried away by an undercover agent who had gained entry by deception. In the present case a forceable seizure occurred on the premises to which entry had been gained by deception, according to the facts as construed by the Arkanas court. Petitioners contend that entry was not gained by deception in the present case, but that the officer along with all the other surveillance officers entered the residence uninvited and by force although the petitioners expected the undercover officer to return as he had stated he was merely going to his car to get the bank bag. However, he had no bank bag and never intended to purchase the marijuana.

The Arkansas Court relied on *Patterson v. People*, ____ Colo. ____, 451 P.2d 445 (1969). That court approved of a seizure of stolen goods by an undercover officer who was present in the home of the defendant under the guise of being a prospective purchaser of the stolen goods.

In its opinion the Arkansas Court acknowledged petitioner's arguments from *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 ____ L.Ed.2d ____ (1971); *Trupiano v. United States*, 334 U.S. 699, 68 S.Ct. 1229, ____ L.Ed.2d ____ (1948) and *Payton v. New York*, ____ U.S. ____, ____ S.Ct. ____, 63 L.Ed.2d 639 (1980), but stated:

> "It is enough, however, to say here that none of these cases involve the exception created by the *Lewis* case which was based upon an invited entry for the purpose of a transaction involving contraband, and thus a waiver of Fourth Amendment rights."

The Arkansas court held defendants had the burden of proof on entrapment, at least in state court citing Ark. Stat. 41-110 (4) and 41-209.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

1. The *Lewis* Decision Sufficiently Defines the Limits of its Application and Review Will Reaffirm or Reduce Those Limits to Exclude the Extension by the Arkansas Court and Others.

The undercover officer in *Lewis*, after identifying himself with a false name, purchased marijuana from Lewis. He carried the marijuana from the premises without forceable seizure. He repeated the same procedure two

weeks later and Lewis was arrested some four months later. The marijuana which was taken from the defendant's home with his consent was introduced and the defendant was convicted. The court said:

> "During neither of his visits to petitioner's home, did agent hear, or take anything that was not contemplated, and in fact intended, by petitioner as a necessary part of his illegal business."

It is obvious that the present case is a completely different situation involving entry by implied consent but resulting in forceable seizure of marijuana. The Arkansas Court recognized this and stated it was entending *Lewis* to these facts.

The *Lewis* opinion further said:

> "But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street."

This does not mean however, that once an agent obtains entry by deceit that he can enter in the future by force with ten other officers for other purposes, that is, arrest. That is, the Fourth Amendment is not waived for all purposes, for all times or for all people. It also does not mean that Lewis waived the Fourth Amendment because of his unlawful act as this rationale would limit the protection of the Fourth Amendment to the innocent. Neither does it mean that a store does not have Fourth Amendment protections.

The *Lewis* opinion further commented:

> "Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation to the *Gouled* case, supra, is sufficient to dispose of that contention."

The search in this case resulted in not only the seizure of the marijuana but of an address book of one of the petitioners which would indicate that this was indeed a general search.

The present situation was not intended by this Court to be included within the *Lewis* rationale. Footnote four to *Lewis* states:

> "Counsel further suggested that, if the agent had arrested petitioner at the latter's home and then conducted a search incidental to the arrest, no constitutional problem would be presented."

The petitioners before the bar do not so stipulate and insist that such a search was unconstitutional under, among other cases, *Trupiano v. United States*, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948), where arrest was deemed legal but the search illegal because there was probable cause to search for the items seized and ample opportunity to obtain a warrant just as in the present situation.

The *Lewis* decision expressly distinguished the *Lewis* facts from the present facts. The opinion states:

> "Finally, petitioner also relies on . . . *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948); and *Johnson v. United States*, 33 U.S. 10, 68

> S.Ct. 367, 92 L.Ed. 436 (1948). But those cases all dealt with the exclusion of evidence that had been forceably seized against the suspect's desires and without the authorization conferred by search warrants. A reading of them will readily demonstrate that they are inopposite to the facts of this case; and, in this area, each case must be judged on its own particular facts."

Those facts which the *Lewis* court expressly excluded from the rationale of that decision, are the facts of the present case. In *McDonald* there was a lawful arrest because the officers saw the defendant committing an offense. However, the court rejected the search because there were no compelling reasons to justify the absence of a search warrant.

There was a powerful dissent to *Lewis* and *Osburn v. United States*, 385 U.S. 323, 17 L.Ed.2d 394, 87 S.Ct. 429 (1967), decided the same day as *Lewis* which dissent appeared at 385 U.S. 340, 87 S.Ct. ____, 17 L.Ed. 405 in which Justice Douglas stated:

> "Entering another's home in disguise to obtain evidence is a "search" that should bring into play all the protective features of the Fourth Amendment. When the agent in *Lewis* had reason for believing that petitioner possessed narcotics, a search warrant should have been obtained."

Petitioners feel Justice Douglas was right and submit that the *Lewis* decision should be re-examined to either reaffirm its limits or reduce them to require a warrant whenever probable cause exists, disguise or not.

2. Review is Necessary to Resolve Conflicts Between the *Lewis* Decision as Interpreted by the Circuit Courts and the States' Highest Courts.

If this court accepts the view of the 9th Circuit in *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974), of *Lewis* then this case must be reversed. There, narcotics officers entered Phillips' office by the ruse of having uniformed officers knock on the door at midnight asking for entry to investigate a report of burglary. There had been no such report. When the door was opened, the uniformed policemen entered followed immediately by narcotics agents. Once inside, the narcotics agents announced they were securing the premises prior to getting a warrant. The defendant voluntarily surrendered cocaine. That court distinguished these facts from *Lewis* because in *Lewis* the officer was invited in for the very purposes contemplated by the occupant where as in *Phillips* the officer was invited in for the stated purpose of a burglary investigation but he was actually entering to arrest Phillips. In the present case of course, the petitioners were led to believe that the officer was entering for the purpose of paying for narcotics when in fact, he had no such intention and intended to arrest them and search the house, assisted by the other officers who entered behind him.

A similarily limiting view of *Lewis* appears in *United States v. Jones*, 292 F. Supp. (1010 D.D.C. 1968). There an informant was carrying a transmitter without a warrant. The court ruled not only can the transmissions from the transmitter not be introduced but the informant cannot testify as to conversations which were transmitted when a warrant could have been obtained. In the present case since a warrant could have been obtained, the product of the entry, marijuana, not conversations, is not admissible.

The Fifth Circuit took the opposite view from the Ninth Circuit in *United States v. Dohm*, 597 F.2d 535 (5th Cir. 1979) reversed on other grounds on rehearing, 618 F.2d

1169 (5th Cir. 1980). The court approved the forcible entry of an undercover agent and other agents after the undercover agent had previously been invited by deception. *Lewis* was cited as authority. However, there are two major factual distinctions between that and the present case. Firstly, in that case there was no probable cause for search because the agent did not know what the source of supply of the narcotics was until he got here immediately prior to the re-entry. Secondly, the court said:

> "Immediate re-entry with minimum disturbance was 'necessary to prevent disposal of the cocaine, a powder which can easily be flushed down a toilet' ".

The same cannot be said for 100 pounds of marijuana. However, the Fifth Circuit's reliance on *Lewis* makes it a dangerous extension of *Lewis* merely than a case of exigent circumstances as it should have been.

Colorado Supreme Court decisions seem to be expanding the rationale of the *Lewis* case in the direction that the Arkansas court did. In *Patterson v. People*, ____ Colo. ____, 451 P.2d 445 (1969) cited in the Arkansas Court of Appeals' opinion, the sheriff was invited to Patterson's apartment for the purpose of transacting an illegal sale of an aircraft radio. The aircraft radio was displayed to the sheriff. A few minutes later three officers appeared at the door and Patterson was arrested. *Lewis* was authority for that decision affirming the conviction. However, that opinion also indicates that a warrant could not have been obtained prior to entry by the sheriff because:

> "When the sheriff came to Patterson's apartment, he was merely investigating the possibility that Patterson may have been involved in the airport theft."

The opinion then states that an officer has no obligation to cease his investigative activities at the first appearance of probable cause, citing *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1967). Petitioners do not contend that the investigation should have ceased, only that a warrant should have been obtained before it continued.

See also *People v. Henry*, 482 P.2d 357 (1971) and *People v. Greathouse*, ____ Colo. ____ 476 P.2d 259 (1970) for similar holdings. Neither of the searches in those cases appeared to be with probable cause.

This Court denied on December 2, 1980, review of the decision in the *Preces v. Florida*, ____ Fla. ____, 378 So.2d 77 (1979), which is factually similar to the present case. Petitioners submit that entry by deception after probable cause is obtained is probably a daily occurrence in every state of the union and this court should grant certiorari to re-analyze *Lewis* in light of the divergent opinions of it.

3. **Review is Necessary To Resolve Conflicts Between *Lewis* and Later Decisions of This Court Which Have Possibly Overruled *Lewis*.**

The Arkansas Court stated that *Lewis* is an exception to *Coolidge v. New Hampshire*, *supra*, *Trupiano v. United States*, *supra* and *Payton v. New York*, *supra*, all of which require warrants where there is probable cause. Since *Lewis* does not refer to any of these decisions and they do not refer to *Lewis* it would appear that there is no authority for that statement. Additionally, the obligation to obtain a warrant in the absence of exigent circumstances where probable cause exists was strengthened in *Arkansas v. Sanders*, ____ U.S. ____, 99 S.Ct. 2586 ____ L.Ed.2d (1979). That case also did not appear to make an exception for searches by deceit.

Further weakening the decision in *Lewis* was the decision in *Lo-Ji Sales, Inc. v. New York*, ____ U.S. ____ 99 S.Ct. 2319, ____ L.Ed.2d ____ (1979). *Lewis* is usually cited for the proposition that when one opens his home for commercial endeavors he waives the Fourth Amendment. The court in *Lo-Ji* held:

> "But there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to the Fourth Amendment guarantees. See *Lewis v. United States, [supra]*."

CONCLUSION

Petitioners see no reason why the obligation to obtain a warrant upon probable cause should not apply to undercover agents who could also obtain entry by consent. In the present case Officer Sylvester had from 9:00 p.m. until 11:30 a.m. the next day to obtain a warrant. He could not say that he did not have probable cause as he had seen the marijuana, transported the marijuana, loaded it into the home of the petitioners himself, and had a sample of it in his possession. If this was not probable cause, there has never been probable cause.

If there was ever a question which reaches into the heart of every city on virtually every day it is whether a warrantless undercover narcotics officer can enter the home of a defendant when he could have obtained a search warrant if he had wanted to. The frequency of this question together with an apparent division of views of *Lewis*, make it appropriate for this Court to make the obligations of undercover officers more clear.

Deceit has largely displaced investigation in criminal prosecutions. Petitioners submit that the framers of the Fourth Amendment would be surprised to find an exception for government deceit in the Constitution of the country they established because of government oppression.

Respectfully submitted,

R. David Lewis
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing PETITION FOR WRIT OF CERTIORARI with APPENDIX have been served by mail on counsel for respondent, addressed as follows: Honorable Steve Clark, Attorney General for the State of Arkanas, Justice Building, State Capitol Grounds, Little Rock, Arkansas 72201, this _____ day of February, 1981.

_____

R. David Lewis

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

ARKANSAS COURT OF APPEALS
Opinion Delivered October 29, 1980
No. CACR 80-31

ALLAN RHOADES and DAVID EMMERLING,	APPEAL FROM THE CIRCUIT COURT OF FAULKNER COUNTY, 12TH JUDICIAL DISTRICT
Appellants	
v.	
STATE OF ARKANSAS,	HONORABLE GEORGE F. HARTJE, Circuit Judge
Appellee	Affirmed.

DAVID NEWBERN, Judge

The main question presented is whether the trial court erred in admitting into evidence marijuana seized at the time the appellants were arrested. That issue centers upon the decision in *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424 (1966), and the problem presented when an undercover police agent obtains entry into a suspect's home by ruse, and the entry results in the seizure of contraband. The state has asked us to extend the rationale of the *Lewis* case. There, an arrest occurred as a result of analysis of contraband which was purchased and carried away by an undercover police agent who had gained entry by deception. Here, a "seizure" occurred on the premises to which entry had been obtained by deception. We agree the *Lewis* rationale may be so extended, and thus we affirm. The

appellants have raised other points which will also be discussed.

With the assistance of undercover police officer Sylvester, the appellants assembled a large quantity of marijuana at the mobile home of the appellant Rhoades and his spouse. The reason it was brought there was so that it might be purchased by Sylvester who was posing as a "big money man" who wanted to purchase a large quantity of marijuana. Sylvester had been introduced to Mr. and Mrs. Rhoades by a police informant who had worked with Michigan authorities and who had informed Arkansas officials that a large quantity of marijuana could be purchased from the Rhoades. Sylvester had rejected the first offer of marijuana by the Rhoades because it was of insufficient quality. This led them to seek more and better marijuana from appellant Emmerling's home at Fairfield Bay and from another source in Texarkana. Sylvester ultimately helped place the assembled marijuana in some 24 bags in the Rhoades' home. On the pretext of leaving to obtain the purchase money from his car, Sylvester moved his car to the front door of the Rhoades' home and raised the trunk lid, thus signaling an assembled surveillance team of officers to approach the home. Sylvester then entered again and announced he was a police officer and that the appellants were under arrest for possession of marijuana. No warrant for the arrest or search or seizure had been issued.

1. *Warrantless seizure.*

In *Lewis v. United States, supra*, the undercover police officer, as in this case, had been invited into the defendants' home for the purpose of purchasing narcotics,

and the defendants contended the intrusion violated the Fourth Amendment to the United States Constitution. There, no warrant had been issued as in this case, but there is an important factual distinction between the cases. In *Lewis*, no contraband was seized. Rather, marijuana was purchased by the undercover police officer and taken away from defendants' home. The arrest occurred later.

The contention of the defendant in the *Lewis* case was that the entry upon his premises was obtained by fraud and that thus the marijuana removed from his premises should not have been introduced into evidence. The United States Supreme Court rejected that contention and stated:

> Without question, the home is accorded the full range of Fourth Amendment protections. See *Amos v. United States*, 255 U.S. 313 (1921); *Harris v. United States*, 331 U.S. 145, 151, n. 15 (1947). But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. [206 U.S. at pg. 211].

Thus, under the facts of the *Lewis* case the protection of the Fourth Amendment was held to have been forfeited by the defendant.

Certainly the principle behind the *Lewis* decision is broad enough to apply here. We have found it thus applied in one other jurisdiction. In the case of *Patterson v. People*, 451 P.2d 445 (Colo. 1969) 168 Colo. Rptr. 417, there was a seizure of stolen goods by an undercover sheriff's officer who was

present in the home of the defendant under the guise of being a prospective purchaser of the stolen goods. The Colorado Supreme Court cited the *Lewis* case and the language quoted above for the proposition that "when one opens his home to the transaction of business and invites another to come in and trade with him," he loses his right to privacy which would otherwise be protected by the Fourth Amendment. See also, *People v. Henry*, 482 P.2d 357 (Colo. 1971).

With respect to this point, the appellants have cited a number of other cases dealing with search and seizure. For example, they have cited *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971), and its progeny for the proposition that a warrantless search may not be conducted absent exigent circumstances, and for the proposition that the "plain view doctrine" does not apply in a case such as this one. They have also cited *Trupiano v. United States*, 334 U.S. 699, 68 S.Ct. 1229 (1948), for the point that an arrest incident to which evidence theretofore known to be present at the place of arrest does not authorize a warrantless search and seizure, and the most recent *Payton v. New York*, 63 L.Ed.2d 639 (1980), which dealt with a warrantless entrance into a suspect's home to make a routine felony arrest absent exigent circumstances. We understand the point the appellants seek to make with these citations, and we understand and share the reluctance of the United States Supreme Court to permit searches and seizures in violation of the privacies guaranteed by the Fourth Amendment. It is enough, however, to say here that none of these cases involved the exception created by the *Lewis* case which was based upon an invited entrance for the purpose of a transaction involving contraband, and thus a waiver of Fourth Amendment rights.

We hasten to point out that we do not believe the United States Supreme Court intended in the *Lewis* case to

condone just any action which might be taken by law enforcement officials who gain entry by deceit for the purpose of conducting a contraband transaction. Their actions must be reasonable under the circumstances. The opinion in the *Lewis* case states at least one limitation, *i.e.*, that an invited entry does not authorize "a general search for incriminating material." (385 U.S. at 211). We can readily imagine many other limitations, and thus we emphasize each case involving the extension of the *Lewis* doctrine, as by the Colorado Court and here, must depend upon the facts showing reasonableness or unreasonableness of the activities of the police.

2. *Entrapment.*

For the proposition that the appellants have been entrapped, they cite *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978), and *United States v. Hastings*, 477 F. Supp. 534 (E.D. Ark. 1977). The *Twigg* case is inapplicable because there it was clear that government authorities supplied the suspect the most difficult ingredient to obtain for the manufacture of an illegal drug as well as a large percentage of necessary laboratory equipment, and they even supplied the place in which the laboratory was set up. The conduct of the police was labeled "outrageous" by the court. The same label was applied in the *Hastings* case where a government informant actually stole an item for the purpose of selling it to the defendants who were then charged with purchasing stolen property. In the case before us there has been no such "outrageous" conduct. Rather, this seems to have been a routine undercover operation. The initial inducement to commit the offense charged did not come from government authorities. It is obvious the appellants were well predisposed to obtain and sell marijuana to the officer. Merely affording one an opportunity to do that which he is

otherwise ready, willing and able to do is not entrapment. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978).

3. *Evidence obtained by fraud and deceit.*

This point is closely related to the first two. Here the appellants contend their motion to suppress the evidence obtained by fraud and deceit should have been granted. The appellants' basic citation is *Gouled v. United States*, 255 U.S. 298, 41 S.Ct. 261 (1921). That case was distinguished by the Supreme Court in the *Lewis* opinion because it involved not only entry by deceit, but a subsequent ransacking of the premises for the purpose of obtaining a particular piece of evidence. Equally distinguishable is the appellants' citation of *Barnato v. State*, 88 Nev. 508, 501 P.2d 643 (1972), in which the opinion dealt with officers who entered premises for an announced purpose completely unrelated to searching for marijuana but then surreptitiously took a leaf, which turned out to be marijuana, without the knowledge or consent of the suspect. Neither of those cases involved an invited entry for the purpose of conducting a transaction involving contraband which was ultimately seized.

The appellants also cite *United States v. J.D. Kramer Grocery Co.*, 294 F. Supp. 65 (E.D. Ark. 1969). There, an officer obtained entry by misrepresentation which was also coercive in that he stated to the suspect that he had a right to inspect the premises without a warrant. Also cited are *White v. State*, 261 Ark. 23 D, 545 S.W.2d 641 (1977), where a consent to search was found negated by the suspect's drunkenness and *Gibbs v. State*, 259 Ark. 997, 504 S.W.2d 719 (1974), in which our supreme court dealt with a seizure of allegedly obscene material absent a prior hearing to determine whether it was or was not obscene. In the course of the *Gibbs* opinion, the supreme court referred to

the state's contention that the seizure was consensual and said that contention lacked merit because the suspect on the premises did not know that the persons who came in and asked to see the movies in question were police officers.

Neither the *White* case nor the *Gibbs* case involved a taking of such obvious contraband as the marijuana in this case. In *Gibbs*, the opinion does not say how the result would have differed had the suspect known the officers were policemen. That factor was not crucial to the result in that case where the real issue concerned "prior restraint" and the First Amendment requirement of a hearing before seizure to determine if the matter in question is obscene.

4. *Entrapment burden of proof*

The appellants cite several cases holding that the burden of proof should be upon the government to show lack of entrapment. The cases cited, however, deal with that burden as it is assigned in the federal courts. In this jurisdiction, entrapment is an affirmative defense, and the court was correct in instructing the jury that the appellants had the burden of proof on this issue. See, *Ark. Stat. Ann.*, §41-209 (1) (Repl. 1977), and *Ark. Stat. Ann.*, §41-110 (4) (Repl. 1977), and *Spears v. State, supra.*

5. *Sentencing instruction.*

The appellants argue they were entitled to an instruction to the effect that the jury could find them guilty and give them no fine or imprisonment. The argument is that because *Ark. Stat. Ann.*, §41-803 (3) (Repl. 1977), states that a defendant convicted of other than capital murder may be sentenced to a term of imprisonment, a fine, or both, and because the fine for a class C felony, in accordance with

Ark. Stat. Ann., §41-1101 (1) (b) (Repl. 1977), is "not more than $10,000," the jury could have chosen the fine alternative and rendered a fine of zero dollars. While we applaud the appellants' counsel's originality displayed in this argument, we agree with the appellee that the court, and not the jury, has the power to suspend imposition of sentence. See *Ark. Stat. Ann.*, §41-803 (4) (Repl. 1977). We agree with the appellee that it was correct for the court to refuse to give an instruction which would have had the effect of permitting the jury to do that which is reserved for the court.

6. *The amount of marijuana possessed.*

The appellants' final argument is that because the expert who testified at the trial tested less than an ounce of marijuana taken from that which was seized, there was no evidence they possessed more than an ounce, and thus the evidence was insufficient to convict them of possession of more than one ounce of marijuana. The testimony in question came from the appellee's expert who said he took a sample from each of the 24 bags which had been seized. The net weight of the substance seized was 99 pounds.

Each of the 24 samples weighed approximately one gram. The amount tested was thus less than one ounce. The testimony of the expert was that in his opinion each of the bags contained marijuana. To say that there was no evidence that more than an ounce of marijuana was present would require us to assume the expert, in taking a "sample" from each bag was somehow able to obtain virtually all of the marijuana in each and that the remainder of the 99 pounds was some other substance. Such an assumption would be, to say the least, unreasonable.

Affirmed.

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS,)
(SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 6th day, being the first Monday of October, A.D. 1980, amongst others were the following proceedings, to-wit:

On the 8th day of December, A.D. 1980, a day of said term _____

ALLAN RHOADES &
DAVID EMMERLING
Appellants

No. CR 80-247 vs.
STATE OF ARKANSAS
Appellee

Appeal from Faulkner
Circuit Court
_____District

Petition for Review is denied.

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NO. 80-1356

IN THE

Supreme Court Of The United States

OCTOBER TERM 1980

Allan Rhoades and David Emmerling,

Petitioners

vs.

State of Arkansas,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER PETITIONER RHOADES' RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY A WARRANTLESS ARREST AND SEIZURE OF CONTRABAND MARIJUANA WITHIN HIS HOME AFTER AN UNDERCOVER LAW ENFORCEMENT OFFICER GAINED ENTRY TO THE HOME POSING AS A BUYER OF THE CONTRABAND MARIJUANA?

II.

WHETHER PETITIONER EMMERLING HAS STANDING TO CHALLENGE THE SEIZURE OF EVIDENCE IN PETITIONER RHOADES' HOME?

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OPINION BELOW

The opinion of the Arkansas Court of Appeals is found at 270 Ark. ____, 607 S.W.2d 76 (1980), and is reproduced in the appendix to the Petition for Writ of Certiorari at page 20.

JURISDICTION

The petitioner relies upon 28 U.S.C. §1257(3) as the basis of this Court's jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The petition has adequately set forth the constitutional provisions involved.

STATEMENT OF THE CASE

The facts of the case are adequately set forth in petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

The petitioners urge this court to grant a writ of certiorari on three related grounds, all based on *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), to wit: (1) that the Arkansas court's decision incorrectly interpreted the holding of *Lewis*, (2) that there exist conflicts between the federal circuit courts of appeal and some of the highest state courts in their construction of *Lewis*, and (3) that there exist conflicts between the *Lewis* decision and later decisions of this Court.

The respondent notes initially petitioner Emmerling's lack of standing to object to this seizure of evidence in petitioner Rhoades' home, in which he held no reasonable expectation of privacy. It does not appear that Emmerling had any proprietary or possessory interest in the Rhoades residence or even whether he had recently spent the night there. Merely being there with the owner's consent is not enough. In this regard see *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), *reh. den.* 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed.2d 83 (1978).

A reading of the cases relied on by the petitioners shows no compelling reason to grant the writ. The distinction made between *Lewis* and the present case is that in *Lewis* the evidence sought to have been suppressed was bought and there was no seizure, whereas in the present case the evidence sought to have been suppressed was seized, though it was contemplated being sold by the petitioners to an undercover law enforcement officer.

In light of this Court's recent denials of petitions for writs of certiorari in the case of *Baldwin v. United States*, 621 F.2d 251 (6th Cir. 1980), *cert. den.* ____ U.S. ____, ____S.Ct.____, ____ L.Ed.2d ____, April 6, 1981, and

Preces v. Florida, 378 So.2d 77 (Fla. App. 1980), *cert. den.* ____U.S. ____, 101 S.Ct. 569, 66 L.Ed2d 471, December 2, 1980, this distinction carries little weight.

In *Preces* virtually the same facts were present that are here present. An undercover officer set up a sale of marijuana with Preces, but seized the contraband and arrested the petitioner, both without a warrant, at the moment the sale was to have been completed. The Florida court affirmed on the basis of *Lewis*, 378 So.2d at 78, and this Court denied review.

In *Baldwin* an undercover agent gained employment from the petitioner as a chaffeur and general handyman and lived with him for six months, during which time the undercover agent seized four samples of cocaine. The trial court denied the petitioner's motion to suppress this evidence on grounds of Fourth Amendment violations, the Six Circuit Court of Appeals affirmed, citing *Lewis* and *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 202, 29 L.Ed.2d 564 (1971) and, as previously noted, this Court denied review.

The petitioners' contention that conflicts exist between federal circuit courts of appeal and the higher state tribunals is not borne out by the cases cited by him. The holding in *United States v. Dohm*, 597 F.2d 535 (5th Cir. 1979), rev'd. on other grounds at reh., 618 F.2d 1169 (5th Cir. 1980), is based on 18 U.S.C. §3109, though it does discuss *Lewis*. 597 F.2d 538. *United States v. Jones*, 292 F.Supp. 1010 (D.D.C. 1968), deals with electronic surveillance and is based on *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). *United States v. Phillips*, 497 F.2d 113 (9th Cir. 1974), is distinguishable because the undercover agents in that case, unlike those in

Lewis and the case *sub judice*, took actions once within the building not "contemplated by the occupant," i.e. securing the building to await a search warrant after gaining entry via uniformed policemen purporting to investigate a burglary. *Lewis, supra,*

358 U.S. at 211.

The quote from *Patterson v. People*, 168 Colo. 417, 451 P.2d 445 (1969) is taken from the portion of the Colorado court's discussion of Patterson's contention that the undercover agent in that case should have advised him of his rights as soon as the agent had probable cause to arrest. *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1967), deals with the admissibility of evidence of admissions made by an accused to one thought to be a friend, but who is actually a government informant who is not a law enforcement officer. That case is distinguishable from the instant case because the source of the evidence in *Hoffa* was not a policeman.

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979), is not in conflict with *Lewis*. In that case a team of police officers and the town magistrate responsible for issuing search warrants conducted a six-hour general search in which the search warrant was filled in as the search progressed, the members of the team opening and viewing merchandise without prior payment. *Lewis* was distinguished from that case on the basis that the official intrusion went beyond the purpose of the occupant in opening the premises to the public, i.e., selling films and viewing of films for prior payment only.

CONCLUSION

The petitioners have not demonstrated that the decision of the Arkansas Court of Appeals is in conflict with any decision of other state courts, federal courts or this Court. Rather, such decision was issued in accordance with well established and well reasoned precedent. For this reason and the reasons and authorities cited herein, the respondent submits that review by this Court is not warranted and that the petition for writ of certiorari should be denied.

Respectfully submitted,
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